

EXHIBIT D

12:35:08 **1** they function is higher than others.

12:35:10 **2 Q** Could we turn to Exhibit 78, which is in evidence.

12:35:28 **3** MS. ISAACSON: Plaintiff's Exhibit 78?

12:35:30 **4** MR. PRESCOTT: Plaintiff's 78.

12:35:32 **5 Q** And I direct your attention, Dr. Bernheim, to the

12:35:34 **6** language under market situation?

12:35:38 **7 A** I'm sorry, is there any way to blow that up, it's a

12:35:40 **8** little bit -- thank you.

12:35:42 **9 Q** Can you see it now?

12:35:44 **10 A** Yes, now it's fine.

12:35:46 **11 Q** Is it your position that the statement quote, June

12:35:52 **12** market price kept on falling rapidly from the beginning of

12:35:58 **13** the month \$9 US per kilogram dropped and to \$7 US per

12:36:02 **14** kilogram at the end of month, closed quote.

12:36:06 **15** Is it your position that that kind of conduct is

12:36:08 **16** consistent with a conspiracy to raise, stabilize and

12:36:14 **17** maintain prices?

12:36:14 **18 A** It is consistent with the way such conspiracies often

12:36:20 **19** operate in practice because their effectiveness waxes and

12:36:26 **20** wanes.

12:36:26 **21 Q** And the document continues on, Weisheng and Welcome

12:36:30 **22** headed the fall. Is your answer the same?

12:36:34 **23 A** Absolutely.

12:36:56 **24 Q** Did you -- could we look at Exhibit 320, which is in

12:37:00 **25** evidence. Did you consider in forming your views that

Mary Agnes Drury, RPR
Official Court Reporter

12:37:10 **1** you've testified to, that the steps taken by the Chinese

12:37:18 **2** vitamin C manufacturers came about -- came up against market

12:37:26 **3** forces, that the market forces were so strong they simply

12:37:32 **4** could not be reversed. And specifically, I'll direct your

12:37:38 **5** attention to the highlighted language in paragraph -- in the

12:37:42 **6** first paragraph on 320.

12:37:54 **7 A** Yes. I'm sorry, the question is, did I take that into

12:37:56 **8** account?

12:37:56 **9 Q** Did you take that into account?

12:37:58 **10 A** Absolutely. This is generally what happens in cartels

12:38:00 **11** when they try to raise prices, they're fighting against the

12:38:04 **12** normal market forces, and some of the time they lose that

12:38:06 **13** battle.

12:38:08 **14 Q** So sometimes market forces can overcome even what a

12:38:14 **15** cartel, whether a compelled cartel or a voluntary cartel is

12:38:20 **16** trying to do?

12:38:20 **17 A** In the sense that a member of the cartel may see an

12:38:26 **18** incentive, may see an opportunity to break away, to defect

12:38:30 **19** and get extra profits. The market forces offer those

12:38:34 **20** opportunities, and that's what occasionally erodes the

12:38:38 **21** effectiveness of the cartels.

12:38:40 **22 Q** And that could also happen if nobody in the alleged

12:38:42 **23** cartel could sell other than at market price, isn't that

12:38:48 **24** right?

12:38:48 **25 A** All cartels operate subject to the constraints of there

Mary Agnes Drury, RPR
Official Court Reporter

12:38:52 **1** is a demand curve in the industry, you can't sell off the

12:38:56 **2** demand curve, that's true.

12:39:00 **3 Q** So ultimately the defendant in this case had to take

12:39:06 **4** into account and abide by the forces of the marketplace

12:39:12 **5** which could not be reversed?

12:39:14 **6 A** That's a vague statement, because the forces of the

12:39:16 **7** marketplace include supply. These guys are in control of

12:39:22 **8** supply. What's out of their control is demand. What they

12:39:24 **9** get to do is pick a point on the demand curve. They don't

12:39:28 **10** get to put the demand curve wherever they want to, that's

12:39:30 **11** the sense in which they are constrained by the market, but

12:39:34 **12** they get to pick a point at a higher price on the demand

12:39:38 **13** curve rather than a lower price.

12:39:40 **14 Q** Now, when you were -- what you presented -- and could

12:39:44 **15** we look at figure 71 again. Thanks, Vivian.

12:40:00 **16** What you have presented to the jury are average

12:40:04 **17** prices, correct? Your red line is an average of monthly

12:40:08 **18** prices as reported to the ITC?

12:40:12 **19 A** That's correct.

12:40:14 **20 Q** So you've not included in what you've shown to the jury

12:40:18 **21** the actual range of prices that were being charged by people

12:40:26 **22** whom you say were coordinating prices?

12:40:30 **23 A** I haven't shown individual transaction prices, correct,

12:40:34 **24** we've looked at average prices.

12:40:36 **25 Q** So let me ask you this, hypothetically, if Hebei

Mary Agnes Drury, RPR
Official Court Reporter

12:40:44 **1** Welcome, my client in a certain month, say, in April of

12:40:48 **2** 2003, were charging \$9 per kilogram for US delivery to a US

12:41:02 **3** customer, and our other defendant Weisheng in the same month

12:41:06 **4** was charging \$4.60 per kilogram for delivery to a customer

12:41:14 **5** in the US, would you, as an economist, say that those prices

12:41:20 **6** look like they were coordinated?

12:41:22 **7 A** This often happens in cartels, there is often a range

12:41:26 **8** of prices. The coordination tends to be done more coarsely,

12:41:34 **9** not in every transaction, but on average prices, overall

12:41:38 **10** quantities, coordinating expectations about what I expect to

12:41:42 **11** sell when I set a certain price, the amount that I expect to

12:41:48 **12** transact. So it does happen in conspiracies quite

12:41:52 **13** frequently that you see -- and I've seen this in a lot of

12:41:54 **14** conspiracies, you see a lot of price dispersion. The

12:41:58 **15** presence of price dispersion does not mean they're not

12:42:00 **16** colluding. What it means is they are not using one specific

12:42:04 **17** mechanism for collusion. The one specific mechanism is we

12:42:08 **18** all agree on a price, that we will prevail on all

12:42:10 **19** transactions. They're not doing that. But I've hardly ever

12:42:14 **20** seen that, usually see distribution.

12:42:16 **21 Q** So your view is that if the range of prices were going

12:42:20 **22** all the way from \$4.60 per kilogram to \$9 per kilogram, that

12:42:28 **23** those could be coordinated prices?

12:42:30 **24 A** Could be or it could be that the \$4.50 price was a

12:42:36 **25** price where one was breaking away and thereby causing

Mary Agnes Drury, RPR
Official Court Reporter

885

12:42:40 **1 starting to undermine the agreement, which may be why prices**
 12:42:44 **2 subsequently fell. What I'm saying is that it's not unusual**
 12:42:48 **3 in a cartel to observe significant price dispersion.**
 12:42:54 **4 Q** Well, didn't you or Bates White look at that price, the
 12:42:58 **5** degree of that price dispersion in preparing your report?
 12:43:02 **6 A Yes, I've looked at that.**
 12:43:02 **7 Q** And -- but you did not include it in this nice, neat
 12:43:10 **8** red line that you've shown us, did you?
 12:43:12 **9 A No, because this nice red line is designed to show what**
 12:43:16 **10 went on with averages. I looked at the distributions to see**
 12:43:22 **11 whether the prices generally tended to move together and**
 12:43:24 **12 they did.**
 12:43:26 **13** MR. PRESCOTT: Move to strike everything after the
 12:43:28 **14** word "no".
 12:43:28 **15** THE COURT: All right. That's -- well, not after
 12:43:32 **16** the word no. It's stricken -- I'll allow the answer: No,
 12:43:40 **17** because this nice red line is designed to show what went on
 12:43:42 **18** with averages. Everything after that is stricken.
 12:43:48 **19 Q** Now, those prices I just read off to you, which were
 12:43:52 **20** range of dispersed prices were in April of 2003, right at
 12:43:58 **21** the -- where the biggest first spike is on your red line.
 12:44:02 **22** Let's look at a range of prices that occurred in January of
 12:44:08 **23** 2004, which is where the second spike is. By the way, do
 12:44:16 **24** you know what accounted for the second spike?
 12:44:18 **25 A I'm sorry, would you like me to --**

Mary Agnes Drury, RPR
Official Court Reporter

886

12:44:20 **1 Q** It was avian flu, wasn't it?
 12:44:22 **2 A No, I don't agree with that. I did an analysis of**
 12:44:26 **3 avian flu in my rebuttal report, and I disagree that it was**
 12:44:30 **4 caused by avian flu.**
 12:44:32 **5 Q** So you believe that that second spike was not caused by
 12:44:36 **6** a spike in demand due to avian flu, correct?
 12:44:40 **7 A That is correct.**
 12:44:40 **8 Q** And you also believe that that second spike in demand
 12:44:44 **9** was not due to a spike due to a fear that it was a
 12:44:52 **10** recurrence of SARS, correct?
 12:44:54 **11 A That's correct.**
 12:44:56 **12 Q** So during that time would you say that prices were
 12:44:58 **13** coordinated in January of 2004 between the defendants if the
 12:45:08 **14** prices arranged from \$3.45 per kilogram all the way up to
 12:45:18 **15** \$8.50 per kilogram for US deliveries, would you say those
 12:45:24 **16** were coordinated?
 12:45:26 **17 A I'm not sure that you and I are using coordinated in**
 12:45:28 **18 the same way. I would say that that is perfectly consistent**
 12:45:32 **19 with these firms coordinating their activity with an effort**
 12:45:36 **20 to raise prices; not being entirely successful with that,**
 12:45:40 **21 there is also some natural variations in the prices that**
 12:45:42 **22 occurs even when they're doing it perfectly. But it's**
 12:45:46 **23 perfectly consistent with attempts to coordinate that are**
 12:45:52 **24 partially effective, which is what we're seeing.**
 12:45:54 **25 Q** So let me make sure I understand. Your approach is

Mary Agnes Drury, RPR
Official Court Reporter

887

12:45:58 **1** that a range of prices that varied by more than \$5 out of a
 12:46:12 **2** total of \$8.50, that those could be prices that were fixed
 12:46:18 **3** according to a conspiracy?
 12:46:20 **4 A I am saying that that's consistent with the presence of**
 12:46:24 **5 a conspiracy that is trying to fix prices and is meeting**
 12:46:30 **6 with some success. And particularly if you look at the**
 12:46:32 **7 concentration of prices, rather than just picking the**
 12:46:36 **8 extremes, which is a little bit misleading, we looked at the**
 12:46:38 **9 concentrations, the general pattern is consistent with**
 12:46:42 **10 coordinated efforts that raise prices.**
 12:46:50 **11** THE COURT: Mr. Prescott, how much more?
 12:46:54 **12** MR. PRESCOTT: I'm guessing about 15 minutes.
 12:46:56 **13** THE COURT: Let's try to finish before lunch.
 12:46:58 **14** MR. PRESCOTT: Okay.
 12:46:58 **15** THE COURT: Actually, are you going to have
 12:47:00 **16** redirect?
 12:47:02 **17** MR. SOUTHWICK: So far one question.
 12:47:04 **18** THE COURT: All right. Let's keep going.
 12:47:38 **19 Q** Now, in finding what you said would be acceptable
 12:47:46 **20** competitive benchmarks for measuring or for determining but
 12:47:50 **21** for prices, you agree, don't you, that the post complaint
 12:47:56 **22** time period is a time period one can usefully look at in
 12:48:04 **23** determining what but for competitive market prices would
 12:48:08 **24** have been?
 12:48:08 **25 A Yes, though I want to be clear, that doesn't mean I'm**

Mary Agnes Drury, RPR
Official Court Reporter

888

12:48:12 **1 saying there is no collusion during that period, I do agree**
 12:48:16 **2 that it is a useful benchmark to use.**
 12:48:20 **3 Q** And you also, in determining your competitive
 12:48:24 **4** benchmark, used a period from November -- from 1998 to
 12:48:30 **5** November of 2001; is that correct?
 12:48:34 **6 A In the main analysis I presented, yes. And I also**
 12:48:38 **7 presented a sensitivity analysis where I didn't use any of**
 12:48:42 **8 that data, we looked at that earlier.**
 12:48:44 **9 Q** And you've used that data even though that was a period
 12:48:48 **10** of direct regulation of vitamin C by the Chinese government?
 12:48:54 **11 A Well, I'm not sure what you mean by direct regulation.**
 12:48:56 **12 There was a regulatory framework in place and the issue is**
 12:49:00 **13 how effective it was.**
 12:49:04 **14 Q** By direct regulation I mean a regulation that says
 12:49:10 **15** those export commodities, which are subject to coordination,
 12:49:16 **16** shall be collectively administered by each respective
 12:49:20 **17** Chamber of Commerce, the particular measures of coordination
 12:49:24 **18** of administration shall be made by each Chamber of Commerce
 12:49:28 **19** and will be strictly implemented upon discussion and
 12:49:32 **20** approval at member meetings. And I mean that that includes
 12:49:38 **21** vitamin C.
 12:49:42 **22** Now, if a period -- if a regulation such as that
 12:49:46 **23** were in effect during the period that you used as a
 12:49:50 **24** competitive benchmark prior to November of 2001, would you
 12:49:56 **25** consider that a valid benchmark for a competitive market?

Mary Agnes Drury, RPR
Official Court Reporter